Supreme Court, U.S.
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No. 87-1454

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988**

MAURICE SKOBLOW,
Petitioner,

v.

AMERI-MANAGE, INC.,
Respondent.

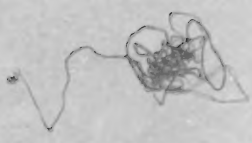
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

DOES THE ELEVENTH AMENDMENT, OR A STATE'S COMMON LAW SOVEREIGN IMMUNITY, CONFER IMMUNITY UPON THE STATE FROM A SUIT BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983 WHEN THE SUIT IS FILED IN STATE COURT.

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STATEMENT OF THE CASE

The Florida Supreme Court ruled in this case that the State of Florida was immune under the Eleventh Amendment and the state's common law sovereign immunity from suits arising under the federal Civil Rights Act, 42 U.S.C. Section 1983. Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077 (Fla. 1987).

This case was consolidated in the Florida Supreme Court with Spooner v. Department of Corrections, 488 So.2d 897 (Fla. 1st DCA 1986), in which the First District Court of Appeal had certified the following question:

> Has the State of Florida pursuant to Section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. §1983?

The identical question was certified by the Third District Court of Appeal to the Florida Supreme Court in Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). In reaching the answer to the above-quoted question in the present case, the Florida high court relied upon its decision in Hill. While the Florida Supreme Court in Hill primarily addressed the issue certified by the District Court of Appeal, the supreme court did confront the issue Petitioner seeks to have reviewed in this Court. Hill had contended that the state has no common law sovereign immunity against a suit brought under federal law alleging the violation of a federal constitutional right. The Florida Supreme Court in Hill, supra, at 131, stated:

> At the outset, we note that even though Quern was a federal court action involving the eleventh amendment, the United States Supreme Court made the

> statement in that case that Congress in enacting section 1983, did not intend "to override the traditional sovereign immunity of the States." 440 U.S. at 341, 99 S.Ct. at 1145.

The Florida court went on to cite, and extensively quote from, a number of state court decisions throughout the country that have decided this issue in accordance with the conclusions reached in Quern v. Jordan, 440 U.S. 332 (1979).

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because neither Congress nor the Florida Legislature has expressed an intent to waive the state's common law sovereign immunity from suits brought pursuant to 42 U.S.C. Section 1983.

Petitioner seeks to have this Court overturn one hundred years of judicial interpretation of constitutional law dating back to Hans v. Louisiana, 134 U.S. 1 (1890). In order to accommodate the supremacy of federal law to the constitutional immunity of the States under our federal system of government, this Court has required an express legislative abrogation of the states' immunity. It has previously decided that Congress has not expressed an intent to subject the states

to liability under 42 U.S.C. Section 1983. Congress has the power to abrogate the State's sovereign immunity pursuant to its authority in the Fourteenth Amendment to enact legislation protecting individual civil rights. Pursuant to the supremacy clause contained in Article VI of the Federal Constitution, such enactment would be applicable to suits brought in state as well as federal court. Congress has been on notice since 1979 as to this Court's interpretation of Section 1983 suits against a State, but has elected not to exercise its power to abrogate the states' immunity under the Fourteenth Amendment.

Petitioner's petition for review amounts to a plea to reconsider decades of settled constitutional law because there is a new complement of justices on this Court. This is not one of the criteria set forth by this Court as reason for review.

Under these circumstances, review of this issue by the Court is unwarranted.

This Court recently denied certiorari review of this case's companion case, Hill v. Department of Corrections, _____ U.S. _____, 108 S.Ct. 1024 (1988), which raised the identical issue. It should do so in this case as well.

ARGUMENT

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT RELIES ON SETTLED FEDERAL LAW AND NO FURTHER RECONSIDERATION OF THIS COURT'S INTERPRETATION OF CONSTITUTIONAL LAW IS WARRANTED.

The Florida Supreme Court decided that the State and its agencies were immune from suits brought pursuant to the federal Civil Rights Act, 42 U.S.C. Section 1983. Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077. The Florida court relied, in part, on its decision in a companion case, Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). This Court recently denied a petition for a writ of certiorari to the Supreme Court of Florida to review that court's judgment and opinion in Hill. Hill v. Florida Department of Corrections, ___ U.S. ___, 108 S.Ct. 1024 (1988). The Court

should similarly deny the Petition in this case since the issue is identical.

The thrust of Petitioner's plea for review is simply that two new justices are now on the Court. Because the Court now has a new complement of justices, Petitioner pleads for a general revision of constitutional jurisprudence - presumably one that is in accord with his own view.[1] This can hardly be a legitimate basis for review, and Petitioner's plea should be firmly denied.

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[1] Petitioner even goes so far as to urge the Court to hold that Section 1983 suits can be maintained against states in federal courts. This request is congruent with Petitioner's position that Hans v. Louisiana, 134 U.S. 1 (1890) was decided on infirm constitutional grounds and should be overruled. Interestingly, Petitioner does not ask the Court to go even further back in time and reconsider its decision in Chisholm v. Georgia, 1 L.Ed. 440 (1793), or review implicit limitations contained in Article III of the Constitution.

Petitioner was able to unearth only three state court decisions which have held that states are "persons" within the meaning of Section 1983. Petition at 29-30. A review of these three decisions is illuminating and dispells Petitioner's claim that the states are in philosophical disarray and confusion. Petition at 29. In Smith v. Department of Public Health, 333 N.W.2d 50 (Mich. App. 1983), the Court of Appeals of Michigan concluded, among other things, that the state was a "person" for purposes of Section 1983 and amenable to suit thereunder. Later decisions of that court and the Michigan Supreme Court overruled this earlier conclusion and ruled that the term "persons" as used in Section 1983 was not intended to include states and state agencies. See, Hampton v. State of

Michigan, 377 N.W.2d 920, 923 (Mich. App. 1985) and Smith v. Department of Public Health, 410 N.W.2d 749, 792 (Mich. 1987).

In Maldonado v. Nebraska Dept. of Public Welfare, 391 N.W.2d 105, 109-110 (Neb. 1986), the Nebraska Supreme Court held that the state had waived its sovereign immunity by the terms of its participation in federal programs, and therefore, the state was liable for attorney fee awards under Section 1988. Thus, Maldonado is inapposite to the present issue because of that court's determination the state had waived its sovereign immunity. A finding of a waiver of sovereign immunity presupposes the validity of that constitutional principle in the first instance.

In Brown v. Wood, 592 P.2d 1250 (Alaska 1979), the Alaska Supreme Court held that the University of Alaska could be held

liable in a suit under 42 U.S.C. Section 1983. This decision relied on Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978), and did not review the clarification of Monell provided in Quern v. Jordan, 440 U.S. 332 (1979). Petitioner does not point out that the Alaska Supreme Court subsequently reversed its position on this issue in State v. Green, 633 P.2d 1381 (Alaska 1981), in reliance on Quern v. Jordan, supra, thereby overruling Brown v. Wood.

This Court settled, for purposes of constitutional jurisprudence, the issue of whether the states are subject to suit under 42 U.S.C. Section 1983 in Quern v. Jordan, supra. The Court held that Congress, in adopting a provision in 1871 which is now 42 U.S.C. Section 1983, did not intend to override the traditional sovereign immunity of the states and

subject them to liability under the Act. In Quern the discussion of the nature of the states' immunity was not limited to Eleventh Amendment immunity. In reaching its determination that Congress had not expressed an intent to override the states' traditional sovereign immunity, and that the several states therefore were not "persons" for purposes of the statute, this Court stated:

> Given the importance of the States' traditional sovereign immunity, if in fact the members of the 42d Congress believed that s.1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act.

440 U.S. at 343.

While the Eleventh Amendment is a bar to the exercise of the judicial power of the federal courts, this Court has

recognized that Eleventh Amendment immunity is merely an exemplification of the states' traditional sovereign immunity directed towards the federal courts. As stated in Ex parte State of New York No. 1, 256 U.S. 490, at 497 (1921):

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

This Court has made it clear that its interpretation of the Eleventh Amendment is an attempt to accommodate the states' traditional sovereign immunity under a federal form of government with Congress' enumerated powers under Section 5 of the Fourteenth Amendment. Pennhurst v. State School & Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651 (1974).

It is readily acknowledged that Congress has the authority under the Fourteenth Amendment to abrogate the states' Eleventh Amendment and traditional sovereign immunity. If Congress were to enact legislation making the states "persons" for purposes of 42 U.S.C. Section 1983, a state could be subjected to liability under the statute regardless of whether the suit was brought in federal or state court.

In Quern, Justice Brennan realizing the full implication of the majority's opinion, attempted in dissent to characterize the Court's conclusion that a State is not a "person" for purposes of Section 1983 as "patently dicta." However, the majority opinion in response stated:

> Mr. Justice BRENNAN's opinion characterizes this conclusion [that Congress did not intend by the general language of s. 1983 to override the traditional sovereign immunity of the States] as "gratuitous" and "paten[t] dicta." Post, at 1150. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiction than to decide which of two conflicting interpretations of Edelman v. Jordan is correct, if in truth we believed that Edelman itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our brother BRENNAN's concurrence in Hutto v. Finney last Term. We therefore fail to see how our reaffirmance of Edelman can be characterized as "dicta."

440 U.S. at 341.

The state courts addressing this issue have understood this Court's ruling and have relied on Quern v. Jordan, supra, and its predecessor, Edelman v. Jordan, 415 U.S. 651 (1974), in reaching the conclusion that the states are not subject to liability under 42 U.S.C. Section 1983. See, e.g., Greene v. Friend of Court, Polk County, 406 N.W.2d 433 (Iowa 1987); State v. Green, 633 P.2d 1381 (Alaska 1981); Pyne v. Meese, 172 Cal.App.3d 392, 403, 218 Cal. Rptr. 87, 92 (1985); Merritt v. State, 696 P.2d 871 (Idaho 1985); DeVargas v. State ex rel. N.M. Dept. of Corrections, 640 P.2d 1327 (N.M. Ct. App. 1981); Karchefske v. Dept. of Mental Health, 371 N.W.2d 876 (Mich. App. 1985); Gay v. State of Texas, 730 S.W.2d 154 (Tex.App. 1987); DeBleecker v. Montgomery County, 438 A.2d 1348 (Md. 1982); Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983).

This Court has denied certiorari in instances where Petitioners have sought to have this issue reviewed again. See, e.g., Ramah Navajo School Board v. Bureau of Revenue, 720 P.2d 1243 (N.M. App. 1986), cert. denied, _____ U.S. _____, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986); Edgar v. State, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077, 100 S.Ct. 1026, 62 L.Ed.2d 760 (1980). And see the Court's disposition of this case's companion case in the Florida Supreme Court, Hill v. Florida Dept. of Corrections, 513 so.2d 129 (Fla. 1987), cert. denied, _____ U.S. _____, 108 S.Ct. 1024 (1988).

This Court has declared that Section 5 of the Fourteenth Amendment vests Congress with the power, where unequivocally expressed, to "overturn the constitutionally guaranteed immunity of the several States." Quern v. Jordan, supra at 342. Petitioner, at 21,

states that this rule of construction "has not proven to be a particularly reliable method of ascertaining congressional intent." Petitioner cites in support of this statement two instances in which Congress has amended the law in response to this Court's application of this rule in determining the scope of legislative enactments. There are, however, alternative perspectives on the analysis of these jurisprudential developments. Rather than viewing these cases as this Court's mistaken interpretation of Congressional intent, they can be viewed from the perspective of the different roles courts and Congress play in the evolution of the law. In this role the Court can be viewed as defining legislative parameters, thereby allowing Congress the opportunity to make clear choices concerning the law's development or stability. This role is

consistent with a philosophy of judicial restraint.

Litigants have contended that the application of the states' sovereign immunity to civil rights actions brought in state court results in the total foreclosure of any forum, state or federal for the redress of constitutional wrongs. This contention creeps into Petitioner's brief at pages 24 through 29, and is patently misleading. A 1983 suit may be brought properly in state or federal court against a state official in his "personal capacity" for a violation of an individual's civil rights and it may seek monetary, declaratory, or injunctive relief. There is no constitutional impediment to civil rights actions against local governments which are not part of the state for Eleventh Amendment purposes. Monell v. Dept. of Social Services of City

of N.Y., 436 U.S. 658 (1978). Injunctive relief is available against state officials. Edelman v. Jordan, 415 U.S. 651 (1974); Ex parte Young, 209 U.S. 123 (1908). Attorney's fees are available in actions brought on behalf of persons who are deprived, under color of state law, of a right secured by the Constitution and laws of the United States whether brought in federal or state court. Maine v. Thiboutot, 448 U.S. 1 (1980).

Thus, what Petitioner is really seeking are unlimited compensatory and punitive damages collectible from the state treasuries. For Petitioner to contend that he has been deprived of a judicial forum for the exoneration of important civil rights is, at best, disingenuous.

The test enunciated by this Court requires Congress to unequivocally express its legislative will on issues having far-

reaching societal implications. This is not so great a burden to place on Congress and is an approach consistent with sound principles of judicial restraint. As Petitioner points out, Congress has not been shy about amending the law in the past where there was a legislative perception of a need for change. In fact, Congress recently flexed its legislative muscle in overriding the President's veto of the Civil Rights Restoration Act, Pub. L. No. 100-259. Congress has been on notice since 1979 of this Court's ruling in Quern v. Jordan. If there is a societal need to abrogate the states' immunity, it is incumbent upon Congress to act.

CONCLUSION

The Florida Supreme Court's decision in Skoblow v. Ameri-Manage, Inc., relies on established constitutional law that the states' sovereign immunity bars liability from actions brought pursuant to 42 U.S.C. Section 1983. Development in this area of the law should be the result of legislative enactment, not judicial tinkering with settled constitutional principles. Congress has expressed no intent to abrogate the states' immunity under Section 1983. Under these circumstances, the Petition for writ of certiorari should be denied.

Respectfully submitted this 1st day of April, 1988.

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